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In the Supreme Court of the United States

OCTOBER TERM, 1980

THE UNITED CREDIT BUREAU OF AMERICA, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner filed a lawsuit in state court against an employee in retaliation for her having filed an unfair labor practice charge against petitioner.

2. Whether the Board properly ordered petitioner to cease prosecuting its civil action against the employee.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 643 F.2d 1017. The Decision and Order of the National Labor Relations Board (Pet. App. A18-A43) is reported at 242 N.L.R.B. 921.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1981. A petition for rehearing was denied on April 24, 1981. The petition for a writ of certiorari was filed on June 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at page 3 of the petition.

STATEMENT

1. Tonia Anderson was discharged from her job with petitioner on October 28, 1977, one day after she had expressed dissatisfaction with certain employee benefit to an official of the company on behalf of herself and several other employees (Pet. App. A2-A3, A-22). Anderson was told that she was terminated because "her attitude toward her job had changed" (*id.* at A3). The General Counsel of the National Labor Relations Board issued an unfair labor practice complaint alleging, *inter alia*, that petitioner had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging Anderson because she had engaged in protected concerted activities (Pet. App. A3).

On March 21, 1978, one day before an unfair labor practice hearing was scheduled to begin, petitioner filed a civil suit in the Superior Court of Baltimore City seeking $10,000 in damages against Anderson, alleging that she had schemed to defraud petitioner by provoking her own discharge with the expectation of receiving a cash settlement from petitioner after unfair labor practice charges were filed with the Board (Pet. App. A3 & n.3). At the March 22 unfair labor practice hearing, petitioner contended that it had not discharged Anderson because of her protected activities but because of her "attitude." As part of its defense, petitioner repeated the allegation made in its civil suit that Anderson had aired her complaints in order to provoke petitioner into discharging her so that she could realize a settlement for the time lost from employment (*id.* at A34-A35).

Upon receiving service of the civil complaint in the state court action, Tonia Anderson filed a charge

with the Board.[1] The General Counsel of the Board issued a second complaint against petitioner, alleging that petitioner had violated Section 8(a)(4) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(4) and (1), by filing its suit against Anderson in state court in retaliation for the initial charge. The second proceeding was consolidated with the earlier one, and the presiding administrative law judge (ALJ) reopened the hearing previously conducted. The General Counsel filed a motion for summary judgment or, in the alternative, for judgment on the pleadings (Pet. App. A4-A5).

A second hearing was held on June 23, 1978.[2] At the outset petitioner's counsel indicated that petitioner intended to offer testimony demonstrating a lawful motive for its having filed the suit against Anderson. The ALJ denied the General Counsel's motion for summary judgment (Pet. App. A6, A24-A25). The General Counsel introduced into evidence a copy of the declaration against Anderson filed by petitioner in state court and rested his case. Petitioner's counsel chose to present no evidence, asserting that the General Counsel had not satisfied his burden of going forward (*id.* at A6, A23-A25). The ALJ cautioned petitioner that evidence had been presented which would withstand a motion to dismiss and that, if petitioner had evidence to present in defense, "this * * * would be the time to do it" (*id.* at A24). Petitioner declined to present any evidence and the hearing was closed.

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[1] Anderson was not served until after the close of the March 22 hearing (Pet. App. A4).

[2] The hearing was initially scheduled for June 27. The ALJ notified the parties by telegraphic order that it had been rescheduled for June 23 (Pet. App. A8-A9).

2. The ALJ, whose decision was adopted by the Board (Pet. App. A18), found that petitioner violated Section 8(a)(1) of the Act by discharging Anderson because she had complained about working conditions (Pet. App. A35). In rejecting petitioner's assertion that Anderson had, in effect, set up her own discharge, the ALJ stated (*ibid.*):

> The only evidence offered to support this contention was that Anderson had recently married, that she had not had time off for a honeymoon, that she had been unhappy because she was not granted sufficient time off on her wedding day, and that she believed a prior employer had failed to treat her properly after she had incurred personal damage and loss in the course of her duties on that job. On the evidence, the premise of this defense is pure speculation. Furthermore, those who discharged Anderson relied on nothing more than her requests for improved benefits in deciding to discharge her. Finally, Respondent was not coerced or entrapped into discharging Anderson for engaging in protected activity, and it is hardly a matter of defense that an employee could count on her employer to discharge her unlawfully in scheming to procure her own discharge.

The ALJ further found that petitioner had filed its civil suit against Anderson in retaliation for her filing the unfair labor practice charge and had thus violated Section 8(a)(4) and (1) of the Act (Pet. App. A36-A38).

The Board ordered petitioner, *inter alia*, to reinstate Anderson with backpay, to cease prosecution of the civil action, and to make Anderson whole for all legal expenses incurred in defending against the civil action (Pet. App. A18-A19, A40-A42).

3. The court of appeals upheld the Board's decision and granted enforcement of its order (Pet. App. A1-A17). The court agreed with the Board that the prosecution of a lawsuit against an employee in retaliation for filing charges with the Board violated Section 8(a)(4) and (1) of the Act (Pet. App. A12-A13). The court further found that substantial evidence supported the Board's finding of a retaliatory motive here (*id.* at A13-A14), explaining:

> The Board's decision was based upon the testimony concerning Anderson's activities and discharge, and the declaration filed in the state court. This evidence amply supports the Board's finding that Anderson's original charge was meritorious * * *. Moreover, United did not adduce any evidence which would support its fraud theory.

Finally, the court rejected petitioner's contention that under *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180, 202-203 (1978), it was entitled to secure resolution of the controversy in the state court system (Pet. App. A15). The court stated (*id.* at A16; citations omitted):

> We find that, because of the intertwined nature of the controversy here—the fact that United's lawsuit is founded upon the alleged fraudulent exercise, on two occasions, of arguably protected rights—and the overlapping factual findings which are determinative of the issues in both cases, that the case involves the same controversy which could have been presented to the Board or the state court. And, as is apparent, "the party who could have presented the protection issue to the Board," *Sears*, 430 U.S. 180, at 202-203, has done so in this

case. Preemption is accordingly required under *Sears*, as well as prior law.

Chief Justice Burger denied United's application for a stay of the judgment of the court of appeals on June 8, 1981.[3]

ARGUMENT

1. As the court of appeals noted with approval (Pet. App. A10, A17), it is the Board's policy that it "should accommodate its enforcement of the Act to the right of all persons to litigate their claims in court, rather than condemn the exercise of such right as an unfair labor practice," but that a lawsuit, or a threat to file one, nevertheless violates the Act if it is "a tactic calculated to restrain employees in the exercise of rights guaranteed by the Act." *Clyde Taylor Co.*, 127 N.L.R.B. 103, 108 (1960); see, *e.g.*, *International Organization of Masters, Mates and Pilots, AFL-CIO* (*Cove Tankers*), 224 N.L.R.B. 1626 (1976), aff'd, 575 F.2d 896 (D.C. Cir. 1978); *Television Wisconsin, Inc.*, 224 N.L.R.B. 722, 779-780 (1976); *United Stanford Employees, Local 680, SEIU, AFL-CIO* (*Leland Stanford Junior University*), 232 N.L.R.B. 326, 331 (1977).

Petitioner does not dispute this policy. Rather, it contends that there was no proof of retaliatory motivation here. That question, which turns on the particular facts of this case, raises no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, there is no merit to petitioner's assertion (Pet. 8-10) that the Board was not entitled to infer unlawful motive from the evidence.

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[3] Petitioner erroneously states (Pet. 7) that the stay was granted.

On the contrary, the Board may draw such inferences "as reasonably may be based upon the facts proven." [4] *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 49 (1954). The evidence here showed that petitioner's contention, on which its civil suit was based, that Anderson had concocted a scheme to engineer her own discharge and reinstatement with backpay, was totally unfounded. In the absence of any further justification for the civil suit, the Board was plainly entitled to infer that it had a retaliatory motive.

Contrary to petitioner's contention (Pet. 9-10), there is no conflict between this case and *Power Systems, Inc.* v. *NLRB*, 601 F.2d 936 (7th Cir. 1979). In *Power Systems* (*id.* at 940), the Seventh Circuit did not dispute the Board's position that an improper motive could be inferred from a determination that the employer "lacked a reasonable basis for its suit" (*id.* at 939). The *Power Systems* court differed only with the Board's conclusion therein that the particular employer's suit lacked a reasonable basis. The court of appeals below took note of *Power Systems* and carefully examined the key factual distinction in a discussion (Pet. App. A11-A12 & n.11) upon which we rely.[5]

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[4] Petitioner's assertion (Pet. 9) that "inferences [were] drawn from naked pleadings alone" was rejected by the court of appeals (Pet. App. A13-A14). Similarly, petitioner's assertion (Pet. 5-6) that it was deprived of an opportunity to present evidence of a non-retaliatory motive by vagueness in the Board's hearing notice was specifically rejected by the court which found petitioner's failure to present evidence at the reopened hearing to have been a tactical decision (Pet. App. A8-A9).

[5] *Associated General Contractors of North Dakota* v. *NLRB*, 637 F.2d 556, 562 (8th Cir. 1980), cited by petitioner (Pet. 9), is inapposite. There the court upheld the Board's

2. Petitioner's reliance (Pet. 11-13) on *Sears, Roebuck & Co.* v. *Carpenters, supra*, for the proposition that the Board improperly ordered cessation of its state court action is misplaced. There the Court rejected a claim that state court jurisdiction of a trespassing claim arising out of union picketing on an employer's premises was preempted by the National Labor Relations Act, in circumstances where no proceedings before the Board had been commenced, and where, as a consequence, no other determination of the merits of the underlying question of labor law was available. 436 U.S. at 185-187, 202, 203 n.34. Unlike the present case, which arose on petition for review of the Board's order and a cross-application for enforcement thereof, *Sears* arose from purely judicial proceedings in the state courts of California. Here, however, the Board was not required to con-

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finding that an employer did not violate Section 8(a)(1) by seeking to enforce in state court a clause of a collective agreement, irrespective of whether the clause was unlawful. The court there held that an unlawful motive was required to make out a violation; it did not hold that such a motive could not be inferred from the totality of the circumstances. Similarly, in *Bergman* v. *NLRB*, 577 F.2d 100, 104-105 (9th Cir. 1978), the court upheld the Board's finding that a union did not violate the Act by filing suit for the purpose of establishing a breach of contract. The court noted (*id.* at 104) that "[t]here is no suggestion that * * * the union's [suit] approaches malicious prosecution or abuse of process. * * * There is no indication that the union did anything other than attempt, in good faith, to enforce a facially valid and binding labor agreement." Accord: *Lodges 743 and 1746, International Association of Machinists* v. *United Aircraft Corp.*, 534 F.2d 422, 463-465 (2d Cir. 1975) (upholding Board's finding that the employer did not violate the Act by instituting a civil suit against the union to recover for property damage due to striker violence).

clude that the state court was divested of jurisdiction of the subject matter of petitioner's civil suit by the existence of the National Labor Relations Act. Rather, the Board simply found that petitioner's maintenance of that suit was unlawful discrimination against the employee Anderson based on her exercise of rights substantively protected by the Act. Indeed, the *Sears* Court noted that "[a]part from notions of 'primary jurisdiction,' * * * there is a constitutional objection to state-court interference with conduct actually protected by the Act" (436 U.S. at 199; footnotes omitted). Accordingly, the preemption analysis established in *Sears* has no application here.

Nor, if the *Sears* preemption analysis were applicable, would the decision below be inconsistent with it. In *Sears* the Court held (436 U.S. at 202) that "[t]he primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or [to] the NLRB, it must be presented to the Board." The Court added, however, that state court jurisdiction was not preempted "over arguably protected conduct when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so" (*id.* at 202-203; footnote omitted). That qualification has no application here. Here, the Board's processes had been invoked. As the court of appeals noted, petitioner's civil suit "is based wholly upon an employee's exercise of protected rights" (Pet. App. A15) which were the subject of the Board's proceedings. Anderson's conduct was found to be protected and petitioner's conduct was found to be prohibited by the Act. In these circumstances, nothing in *Sears* permits petitioner to relitigate those determinations

in state court. Were petitioner's contention accepted, this Court's decision in *Sears*, which rested upon a perceived gap in the remedies available through the Board's processes, see 436 U.S. at 202, would itself become a means of preventing the Board from affording relief from violations of the National Labor Relations Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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